No. 94544-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re Personal Restraint of:

EDDIE DEAN ARNOLD,

Respondent.

AMICUS BRIEF OF LEWIS COUNTY

On review from the Court of Appeals, Division Three

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I. INTEREST OF AMICUS CURIAE

Lewis County (Amicus) is a municipal corporation that must register sex offenders within its boundaries when required by law. It recently obtained a declaratory judgment that a particular man had a duty to register as a sex offender based on a 1984-1985 conviction for Statutory Rape in the First Degree. Order Granting Judgment on the Pleadings, *In re Registration of George Dean Bartz*, Lewis County Sup. Ct. Cause No. 16-2-00930-21 (Sept. 1, 2017), *attached as* Ex. 1. Lewis County seeks to prevent this decision from being overruled *sub silentio* because this Court is unaware of it.

II. ISSUE PRESENTED

Does a conviction for Statutory Rape (in any degree) require sex offender registration notwithstanding those crimes' repeal? Under *State v. Taylor*, 162 Wn. App. 791, 259 P.3d 289 (2011) and its progeny, the answer is no: Statutory Rape's repeal means that it no longer "is" a violation of Ch. 9A.44 RCW. But, if RCW 9A.44.900 and RCW 9A.44.901 require Statutory Rape to be "added to Title 9A RCW as a new chapter with the designation chapter 9A.44 RCW" and "construed as part of Title 9A RCW," isn't a Statutory Rape conviction a violation of Ch. 9A.44 RCW requiring registration?

III. STATEMENT OF THE CASE

The full facts of the case are described in the Court of Appeals' opinion and the parties' briefing below. For this brief, what

matters is that Mr. Arnold was convicted of Statutory Rape in the Second Degree under former RCW 9A.44.080 (1979). The defendant in Lewis County's case had been convicted of Statutory Rape in the First Degree under former RCW 9A.44.070 (1979), and the defendant in *State v. Taylor* had been convicted of Statutory Rape in the Third Degree under former RCW 9A.44.090 (1979). *Taylor*, 162 Wn. App. at 793-94. The relevant legislative history for all three crimes is identical.

IV. ARGUMENT

A. *Background on Sex Offender Registration*

"Any adult . . . who has been found to have committed or has been convicted of any sex offense . . . shall register with the county sheriff for the county of the person's residence." RCW 9A.44.130. For purposes of this section, "sex offense" is defined:

> (10) "Sex offense" means:
>
> (a) Any offense defined as a sex offense by RCW 9.94A.030;
>
> . . .
>
> (h) Any out-of-state conviction for an offense for which the person would be required to register as a sex offender while residing in the state of conviction; or, if not required to register in the state of conviction, an offense that under the laws of this state would be classified as a sex offense under this subsection;
>
> . . .
>
> (*l*) Any tribal conviction for an offense for which the person would be required to register as a sex offender while residing in the reservation of conviction; or, if not required to register in the

> reservation of conviction, an offense that under the laws of this state would be classified as a sex offense under this subsection.

RCW 9A.44.128(10). Subsection (a), in turn, incorporates the following definition:

> "Sex offense" means:
>
> (a)(i) A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.132;
>
> . . .
>
> (b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection;
>
> . . .
>
> (d) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

RCW 9.94A.030(47).

So, a felony that "is a violation of chapter 9A.44 RCW" frequently requires registration. RCW 9A.44.128(10)(a); RCW 9.94A.030(47)(a)(i). Federal, out-of-state, and tribal convictions require registration if they are comparable. RCW 9A.44.128(10)(h), (*l*); RCW 9.94A.030(47)(d). Also, pre-1976 Washington felonies require registration if they are comparable. RCW 9A.44.128(10)(a); RCW 9.94A.030(47)(b).

B. *The* Taylor *Decision and Its Progeny*

In *State v. Taylor*, 162 Wn. App. 791, 259 P.3d 289 (2011), the Court of Appeals considered whether Statutory Rape in the Third

Degree required registration after that crime was repealed in 1988. Taylor had been convicted based on a 1982 incident of violating former RCW 9A.44.090 (1979), which was repealed by Laws of 1988, ch. 145, § 24. *Id.* at 793-94. Reviewing the legislative history of sex offender registration, the court noted that registration was originally intended to be prospective only, and then made retroactive later by changes to the definition of sex offense. *Id.* at 797-99. Notwithstanding those changes, however, the definition included only a felony that *is* a violation of chapter 9A.44 RCW, not one that *is or was* such a violation. *Id.* at 799. Comparing the treatment of those convicted before 1976 (for which comparability provisions applied) and after 1976 (for which no comparability applied), the court noted that its interpretation resulted in a gap wherein certain offenders would not have to register. *Id.* This gap did not make a lot of sense and was probably unintentional, but the court left it for the legislature to fix. *Id.* Because Statutory Rape had been repealed after 1976, it no longer "is" a violation of Ch. 9A.44 RCW and, per the court, is not registrable. *Id.* at 800-01.

Taylor's analysis is slightly more anomalous than the opinion recognizes. It is not merely pre-1976 convictions that are registrable if comparable; it is all federal, out-of-state, tribal, and pre-1976 Washington convictions. RCW 9A.44.128(10)(a), (h), (*l*); RCW 9.94A.030(47)(a)(i), (b), (d). Thus, under Taylor's logic, the

legislature essentially intended all comparable felons to register except those convicted of a Washington sex offense repealed after 1976—which, as the court recognized, is so odd a choice as to seem accidental. *Taylor*, 162 Wn. App. at 799. Notwithstanding the unusual result, each division of the Court of Appeals has now followed *Taylor*. *See generally In re Pers. Restraint of Arnold*, 198 Wn. App. 842, 396 P.3d 375 (2017); *In re Pers. Restraint of Wheeler*, 188 Wn. App. 613, 354 P.3d 950 (2015). Is there a way to honor *Taylor*'s analysis and yet avoid this anomalous result?

There is: none of these cases considered how Statutory Rape came to be included in Chapter 9A.44 RCW and later repealed. When one considers the rest of the legislation, *Taylor* militates for the opposite result—curing any anomaly.

C. *What* Taylor *Missed: RCW 9A.44.900-.901*

The three degrees of Statutory Rape used to be codified at former RCWs 9.79.200, .210, and .220 (1975), respectively. In 1979, the legislature recodified all of the Statutory Rapes, "as now or hereafter amended," into Chapter 9A.44 RCW. Laws of 1979 ex.s. ch. 244 § 17. In so doing, the legislature provided that the recodified sections "added to Title 9A RCW as a new chapter with the designation chapter 9A.44 RCW shall be construed as part of Title 9A RCW." *Id.* at §18. These two recodification pronouncements were themselves codified at RCW 9A.44.900-.901.

Each degree of Statutory Rape persisted for a time under its new designation, former RCWs 9A.44.070, .080, and .090 (1979), respectively. Then in 1988, the legislature split Statutory Rape into new crimes. *See* Laws of 1988, Ch. 145 §§ 2–9 (defining Rape of a Child, Child Molestation, and Sexual Misconduct with a Minor in terms of the victim's age and the type of sexual encounter). Having done so, the legislature repealed each degree of Statutory Rape. *Id.* at § 24. The repeal provision specifies the RCW codification of each degree of Statutory Rape and relevant prior session laws by section. *Id.* The repeal provision does not mention RCW 9A.44.900 or .901, nor the sections of the prior session law enacting them (Laws of 1979 ex.s. ch. 244 § 17-18). *See id.* Further, the legislature noted, "This act shall not have the effect of terminating or in any way modifying any liability, civil or criminal, which is already in existence on July 1, 1988, and shall apply only to offenses committed on or after July 1, 1988." *Id.* at § 25.

RCW 9A.44.900 and .901 are still on the books and have never been repealed. They still instruct one to construe former RCW 9.79.200-.220 and former RCW 9A.44.070-.090 as part of Chapter 9A.44 RCW. The law that repealed RCWs 9A.44.070-.090 specifically did not repeal this instruction, and affirmatively mandated that it not alter existing criminal or civil liability as of July 1, 1988 or apply to any offense before that date.

The importance of RCW 9A.44.900-.901 is that in 1988, Statutory Rape was included in Chapter 9A.44 RCW *twice*: once as a substantive crime that could be charged, and once as a cross-reference indicating how that crime and its predecessor should be construed. The 1988 legislature repealed only one of the two instances, the substantive crime. It did not repeal the cross-reference and construction rule, suggesting an intent that those provisions remain in force. *See Amalgamated Transit Union Legislative Council of Wash. State v. State*, 145 Wn.2d 544, 552-53, 40 P.3d 656 (2002) (applying "expressio unius est exclusio alterius" in the context of repealer). To underscore the point, the legislature specifically called out its intention not to alter liability for offenses before July 1, 1988. Laws of 1988, Ch. 145 § 25. In short, although Statutory Rape cannot be charged as a substantive crime anymore, it remains a violation of Ch. 9A.44 RCW: the legislature mandated that a conviction of 9A.44.070, .080, or .090 from an offense occurring before July 1, 1988 be construed as such. RCW 9A.44.900-.901; Laws of 1988, Ch. 145 § 25.

Under *Taylor*'s logic, Statutory Rape is registrable only if it "is" a violation of chapter 9A.44 RCW. *Taylor*, 162 Wn. App. at 799. That court mistakenly believed that the repeal of those crimes removed Statutory Rape from Ch. 9A.44 RCW, but it did not. Because

Statutory Rape is still to be construed as part of that chapter, by *Taylor*'s own logic it is a registrable offense.

To be fair, no one pointed out RCW 9A.44.900-.901 to the *Taylor* court. The statutes are not mentioned in any of the briefing. *See* Appellant's Brief, *State v. Homer C. Taylor III,* No. 40887-2 (Dec. 14, 2010); Respondent's Brief, *State v. Homer C. Taylor III,* No. 40887-2 (Feb. 10, 2011); Appellant's Reply Brief, *State v. Homer C. Taylor III,* No. 40887-2 (Feb. 23, 2011). *Wheeler* and *Arnold* adopt *Taylor's* result without considering this argument, either. *See Arnold, 198 Wn. App.* at 849; *Wheeler*, 188 Wn. App. at 619-20.[1] But this is all the more reason why these cases should be distinguished: the court is "not in the business of inventing unbriefed arguments for parties sua sponte." *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999).

Recognizing the import of RCW 9A.44.900-.901 cures *Taylor*'s anomaly. *Taylor* noted that the gap its interpretation created seemed accidental. *Taylor*, 162 Wn. App. at 799. With the newfound understanding that the "gap" convictions are accounted for by a rule of construction, the gap disappears. Post-1976 convictions are

[1] *Wheeler* does mention legislative acquiescence to *Taylor*'s reasoning. *Id.* at 621. But *Wheeler* goes on: "'[W]here statutory language remains unchanged after a court decision the court will not overrule clear precedent *interpreting the same statutory language.*'" *Id.* (quoting *State v. Stalker*, 152 Wn. App. 805, 812-13, 219 P.3d 722 (2009)) (emphasis added). Here, it is the effect of *different* statutory language, RCW 9A.44.900-.901, on which Amicus relies. This argument does not require the Court to revisit *Taylor*'s statutory interpretation that only a crime that "is" a violation of Ch. 9A.44 RCW is registrable; it merely asks that this interpretation be followed to its natural conclusion in light of other statutes.

registrable to the extent that the crime of conviction "is" in Ch. 9A.44 RCW, whether substantively or by rule of construction. Pre-1976 convictions pre-date Ch. 9A.44 RCW, and so are registrable if they are comparable to an offense therein, just like federal, tribal, and out-of-state convictions. The entire system is geared toward requiring registration for crimes Washington has considered sex offenses since 1976, when the state began systematically addressing such offenses. Following this line of analysis therefore furthers and unifies the legislative intent of the statutory scheme.

This Court should set the record straight: Statutory Rape convictions are violations of Ch. 9A.44 RCW that require sex offender registration. The Court should reverse the Court of Appeals.

V. CONCLUSION

Mr. Arnold's conviction of Statutory Rape is a violation of Ch. 9A.44 requiring sex offender registration, notwithstanding that crime's repeal. *State v. Taylor* and its progeny hold to the contrary. But, these cases never considered a key aspect of Statutory Rape's legislative history. At the time of the crimes' repeal, two other statutes cross-referenced each degree of Statutory Rape and directed that all three be included in and construed as part of Ch. 9A.44 RCW. RCW 9A.44.900-.901. These statutes were never repealed and remain good law. As a result, convictions of Statutory Rape are to be construed as violations of Ch. 9A.44 RCW, meaning

under *Taylor*'s own logic that they are sex offenses requiring registration. This Court should clarify that Statutory Rape requires sex offender registration and should reverse the Court of Appeals.

RESPECTFULLY submitted this Nov. 16, 2017.

JONATHAN L. MEYER
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by:_____
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DECLARATION OF SERVICE

I swear under penalty of perjury under the Laws of the State of Washington that on 11-16-2017, I served a copy of this document upon the parties by EMAILING it to the following addresses:

DPA Gretchen Verhoef: gverhoef@spokanecounty.org; and
Mr. Arnold's' Attorney Reed Speir: reedspeirlaw@seanet.com.

Dated this 16th day of November, 2017, at Chehalis, Washington,

_____
Eric Eisenberg

Exhibit 1

Order Granting Judgment on the Pleadings,
***In re Registration of George Dean Bartz*,**
Lewis County Sup. Ct. Cause No. 16-2-00930-21 (Sept. 1, 2017)

16-2-00930-21
ORGMT 26
Order Granting Motion Petition
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Superior Court of Washington

County of Lewis

In re: REGISTRATION STATUS OF GEORGE DEAN BARTZ Interested parties: George Dean Bartz, a natural person; and Lewis County, a municipal corporation.	**No.** 16-2-00930-21 **ORDER GRANTING JUDGMENT ON THE PLEADINGS**

THIS MATTER, having come on for a hearing on Lewis County's motion for judgment on the pleadings as to its complaint for declaratory judgment that George Bartz must register as a sex offender; the court having considered the pleadings,[1] and the argument of Deputy Prosecuting Attorney Eric Eisenberg and of Mr. Bartz's attorney Christopher Baum; and in all other pertinent matters being fully advised;

[1] Mr. Bartz initially represented himself in the case, and filed responsive briefing, prior to the appointment of counsel. The Court considered all of the briefing in the case.

IT IS NOW THEREFORE ORDERED:

1. Mr. Bartz did not file an answer, despite appearing and briefing issues in the case. Thus, the complaint establishes the facts.[2] The Court considers them in the light most favorable to Mr. Bartz.[3]
2. Considering the facts in that light, Lewis County is entitled to the judgment as a matter of law.
3. Mr. Bartz's 1991 conviction for Statutory Rape in the First Degree—which was predicated on dates of violation from 1984-85—is a sex offense requiring registration, notwithstanding that statute's repeal in 1988.[4]
4. Although *State* v. *Taylor*[5] and its progeny hold that Statutory Rape no longer is a sex offense requiring registration, those cases are distinguishable. Each is predicated on the belief that the repeal of all degrees of Statutory Rape removed the statutes from Chapter 9A.44 entirely. However, RCW 9A.44.900 and RCW 9A.44.901 provide that Statutory Rape be construed as part of that chapter, and these statutory sections are still in force.[6] Under *Taylor's* own logic, since Mr. Bartz's Statutory Rape conviction is still to be construed as a violation of Chapter 9A.44 RCW, it is a sex

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[2] CR 8(a).
[3] *Pearson* v. *Vandermay*, 67 Wn.2d 222, 230, 407 P.2d 143 (1965).
[4] Mr. Bartz also has a 1991 conviction for Statutory Rape in the First Degree predicated on an offense date of 1988-89. The ruling on this case is not based on that conviction, but solely on the conviction for the 1984-85 offense date.
[5] 162 Wn.App. 791, 259 P.3d 289 (2011).
[6] *Taylor* and its progeny do not address the effect of RCW 9A.44.900 and RCW 9A.44.901. This silence may, indeed, explain the "gap" to which the *Taylor* court refers.

offense requiring registration. A post-repeal conviction for a pre-repeal crime is a valid conviction.[7]

5. RCW 9A.44.900 and RCW 9A.44.901 have not been repealed. Nor has the Legislature repealed the session law provisions that created those RCWs: Laws of 1979 ex. S. Ch. 244 §§ 17-18. The law repealing Statutory Rape specifies the RCW codification of each degree of Statutory Rape and the relevant prior session laws by section.[8] The omission of RCW 9A.44.900 and RCW 9A.44.901 and Laws of 1979 ex. s. Ch. 244 §§ 17-18 in this law indicates an intent not to repeal them.[9] Thus, the same legislature that eliminated the Statutory Rape expressed an intent that RCW 9A.44.900 and RCW 9A.44.901's rule of construction—i.e., that Statutory Rape be construed as part of Ch. 9A.44 RCW—persists after repeal. No subsequent legislature has altered this rule of construction, and it applies today. Accordingly, Statutory Rape is a current violation of Ch. 9A.44 RCW and requires sex offender registration.[10]

6. ACCORDINGLY, George Dean Bartz has a duty to register as a sex offender under RCW 9A.44.130, and a county may register and maintain the registration of Mr. Bartz in the same manner as other similarly registered offenders, or expose himself to the consequences of failing to register under Washington law.

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[7] RCW 10.01.040.
[8] Laws of 1988, Ch. 145 § 24.
[9] See *Amalgamated Transit Union Legislative Council of Wash. State* v. *State*, 145 Wn.2d544, 552-53, 40 P.3d656 (2002) (applying "*expression unius est exclusion alterius*" in the context of repealer).
[10] *See State* v. *Talyor*, *supra*, at 799.

7. Neither party is awarded any costs nor attorney fees nor any other damages.

8. This matter is concluded.

Issued this 1st Day of September 2017

J. Andrew Toynbee

Superior Court Judge

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November 16, 2017 - 2:34 PM

Transmittal Information

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Comments:

Both the Amicus Brief and Motion to File Amicus Brief are submitted.

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